SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-646

JOSEPHUS REYNOLDS, et al.,

Petitioners,

v.

ROBERT W. PASTER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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November 25, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. ____

Josephus Reynolds, et al.,

Petitioners

v.

Robert W. Paster, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners, Intervenor Defendants at trial, petitioned for a writ of certiorari to review the judgment of the Supreme Court of Missouri entered on July 30, 1974. The parties to this proceeding are: Mr. and Mrs. Josephus Reynolds, in their own behalf, and as parents and next of friend of Richard B., Mark S., Theresa M., JoAnne F., and Elizabeth Ann Reynolds, minors; Mr. and Mrs. Joseph Fine, in their own behalf and as parents and next of friend of Barry, Halbert, and Mike Fine, minors; Mr. and Mrs. Ferol Thaemart, in their own behalf and as parents and next of friends of Angela Thaemart, minor; Mr. and Mrs. Lawrence Lage, in their own behalf and as parents and next of friends

of Debbie, Marie, Diane, Betty, James, Carolyn, Andrew, and Alice Lage, minors; Mr. and Mrs. Thomas Tobin, in their own behalf and as parents and next of friends of Thomas C., Martha M., Sandra C., James A., Daniel F., and Joseph P. Tobin, minors; Mr. and Mrs. Kenneth Meng, in their own behalf and as parents and next of friends of Linda and Janet Meng, minors; Mr. and Mrs. Edward Bakalar, in their own behalf and as parents and next of friends of Mary, Betty, Anthony, and Lori Bakalar, minors; Mr. and Mrs. Arthur J. Conley, in their own behalf and as parents and next of friends of Mark and Patricia Conley, minors; Mr. and Mrs. Harold Maurer, in their own behalf and as parents and next of friends of Thomas, Arthur, Susan, and Joseph Maurer, minors; Mr. and Mrs. William Backes, in their own behalf and as parents and next of friends of Leon, Ronald, Kenneth, Linda, Douglas, Norma, and Wanda Backes, minors; Petitioners.

Robert W. Paster, a minor, by and through his next of friend, Phillip J. Paster, and James M. Hornback, a minor, by and through his next of friend, James F. Hornback, Respondents; and C. Ed Tussey, F. Eugene Pennington, Henry E. Oppenheimer, Sanford J. Zimmerman, Charles F. Hamilton, Louis Fernandez, Frederic E. Busse, James L. Cummings, Garnell L. DeRamus, Andrew M. Doyle, Rosalind Harris, James E. Hurt, Jr., Malcolm W. Martin, Elmer W. Pounds, Ruth B. Scheetz, Daniel L. Schlafly, Wallace D. Schoenbeck, and Adella T. Smiley, Respondents; and John C. Danforth, Attorney General of Missouri, Respondent.

OPINIONS BELOW

The trial court opinion is not reported but is set forth as Appendix A (Pages A1-A24).

The Opinion of the Supreme Court of Missouri, is reported at 512 S.W. 2d 97, and also is set forth here as Appendix B (pages A25-A62). The Final Decree of the Circuit Court of St Louis County entered pursuant to the Opinion of the Supreme Court of Missouri, is not reported but is set forth as Appendix D (pages A64-A70).

JURISDICTION

The judgment of the Supreme Court of Missouri was issued on July 30, 1974. A timely motion for rehearing was filed which motion was denied by the Supreme Court of Missouri on August 26, 1974, (Appendix C, p. A63). The jurisdiction of this Court is invoked under 28 USC 1257(3) and 28 USC 2101 (c).

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether Article IX, Section 8, of the Missouri Constitution, as applied by the state court in this case, to an Allen-type general secular textbook loan law, so as to withdraw textbooks solely from children attending church-related schools while providing textbooks to all children attending public and non-sectarian, private schools violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment by establishing an invidiously discriminatory classification based upon the exercise of religion and the association with a church-related school.

2. Whether the state's action of withdrawing secular textbook loans solely because of the individual recipient's association (not government's action) with a church-related school is an infringement of petitioners right to freely exercise their religion and freedom of association as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment which state in pertinent parts as follows:

> AMENDMENT I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"
>
> AMENDMENT XIV, Section 1: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provision of the Constitution of Missouri is Article IX, Section 8, which reads as follows:

> "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary,

college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

The Missouri Textbook Law, Section 170.051, RSMo. Supp. 1973 (Senate Bill 638, 76th General Assembly), reads as follows:

"1. As used in this Section, the following terms shall have the meaning indicated unless the context otherwise requires:

(1) "Textbook", means workbooks, manuals, or other books, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

(2) "School", means any elementary or secondary school, public or nonpublic, nonprofit, within this state, and wherein a resident of the state may legally fulfill the compulsory school attendance school requirements of section 167.031, RSMo.

2. Each public school board shall

purchase and loan free all textbooks for all children who reside in the district and attend an elementary or secondary school in this state.

3. Textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended.

4. Title to and control and administration of the use of all textbooks purchased under this section shall be vested in the public school board and shall be loaned free to pupils and teachers upon their request. The public school board may prescribe rules and regulations governing the loaning of textbooks.

5. No school board shall be required to purchase textbooks to be lent under the provisions of this act from sources of revenue other than the free textbook fund, except that in addition to the textbooks purchased under this act, a school board may purchase from its incidental fund texts, supplementary texts, library and reference books and instruction supplies, for the use of pupils attending public schools only. In the event that the money from the free textbook fund is insufficient to purchase textbooks for all elementary and secondary pupils, then priority shall be given to elementary pupils.

6. Only textbooks which are filed with the state board of education pursuant to section 170.061, RSMo, shall be purchased and loaned under this section. No textbooks shall be purchased or loaned under this section to be used in any form of religious instruction or worship.

7. Textbooks shall be purchased from the free textbook fund. No portion of the public school fund referred to in section 5, article IX constitution of this State shall be used to pay this cost of textbooks under this section nor shall funds under this section be in any way commingled with the public school fund."

STATEMENT OF THE CASE

The Missouri Legislature, by a resounding vote in each house, enacted an Allen-type program lending secular textbooks to all (both public and private school) children expressly declaring that "textbooks shall be loaned to all pupils residing in the district on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended." Section 170.051-3, RSMo. Supp. 1973. All children were counted in the apportionment of funds for the program.

The state court applied the "child benefit" theory and did not find that the textbook program aided churches or church-related schools but, based solely on the grounds that children attending church-related schools as individuals promoted a sectarian purpose by merely attending a church-related school, the state courts enjoined the lending of textbooks to children attending church-related schools while continuing the lending of textbooks to children attending public schools or non-sectarian, private schools.

THE PARTIES: Petitioners are members of a class of children who attend church-related and non-sectarian schools in the State of Missouri and their parents. They were designated Intervenor Defendants in the trial court. Petitioners attend Jewish, Protestant, and Catholic schools at varying locations throughout the State. Some attend inner city schools, with significant Black enrollment, some

attend suburban and others small rural schools. Prior to enactment of the 1974 textbook statute, all petitioners paid for their own textbooks. Some petitioners send their children to church-related schools "in the exercise of their religious convictions."

Respondents, Paster and Hornback, are children enrolled in public schools in Missouri and their parents who challenged the constitutionality of the textbook law. They were Plaintiffs in the trial court.

The Defendants Tussey, Pennington, Oppenheimer, Zimmerman, Hamilton, and Fernandez are members of the Board of Education of Ladue School District and the Defendants Busse, Cummings, DeRamus, Doyle, Harris, Hurt, Martin, Pounds, Scheetz, Schlafly, Schoenbeck, and Smiley are members of the Board of Education of the City of St. Louis in Missouri and were Defendants in the trial court.

Respondent John C. Danforth is the Attorney General of Missouri and was an Intervenor Defendant in the trial court.

THE PROCEEDINGS BELOW: The trial court (the Circuit Court of St. Louis County) upheld the Missouri Textbook Act Section 170.051, RSMo Supp. 1973, under both federal and state constitutions with the exception of the provision for lending textbooks to public and private school teachers. The trial court filed an opinion entitled "Court's Memorandum of Law" which is unreported. The opinion is set out as Appendix A, pages A1 to

A24. An evidentiary hearing was held. The trial court said, "Senate Bill 638 (§170.051, RSMo. Supp. 1973) is clearly intended to aid school children and not their schools.... Our findings and conclusions (are) that the Bill has a larger public purpose derived from the police power to advance the general welfare by helping educate all children on an equitable, non-discriminatory basis...." (Emphasis original, parens. added) (Appendix A, p. A19.) Stay requests were denied and the program went into full operation for over two years.

On appeal, although the Missouri Supreme Court did not find error in the trial court's findings and applied the "pupil-parent benefit" theory, it reversed the trial court. The State Supreme Court stated the question for decision was as follows: "Is the expenditure of funds to the pupil-parent in aid of a sectarian purpose?" (Appendix B, p. A44.) The court answered that question by stating, "Individuals, acting individually or collectively, can have and promote a sectarian purpose, and by attending a private school designed for such a purpose do, in fact, promote the sectarian objectives for which Article IX, Section 8 prohibits the expenditure of any public funds." (Appendix B, pp. A44-45.) The State Supreme Court based its decision solely on its interpretation and application of Article IX, Section 8 of the Missouri Constitution.

On remand, the trial court entered an injunction pursuant to the State Supreme Court's decision. The decree declares the portions of Section 170.051, RSMo. Supp. 1973, regarding the lending

of textbooks to pupils attending private schools to be in violation of Article IX, Section 8 of the Missouri Constitution "insofar as they relate to pupils attending schools controlled by any religious creed, church, or sectarian denomination whatever." (Appendix D, p. A67.) Public boards of education were permanently enjoined from lending textbooks "to pupils or teachers of the sectarian, church-related or religion-oriented classes." (Appendix D, p. A67.)

THE FEDERAL CONSTITUTIONAL ISSUES WERE TIMELY RAISED. The trial court upheld the Missouri textbook statute under both state and federal constitutions. Although the trial court, in its opinion, alluded to the Free Exercise issue (Appendix A, pp. A8-9), since it upheld the state statute there was no need for a decision of other issues. The federal constitutional issues which are raised in this Petition for Writ of Certiorari only emerged fully when the Supreme Court of Missouri issued its opinion of July 30, 1974. It is the State Supreme Court's application of Article IX, Section 8 of the Missouri Constitution which creates the federal constitutional issues. Petitioners filed a motion for rehearing with the State Supreme Court and presented the federal constitutional issues now addressed to this court. The state court denied the motion for rehearing (Appendix C, p. A63). Thus, the federal constitutional issues have been timely raised to the state courts.

REASONS FOR GRANTING THE WRIT

A. UNSETTLED FEDERAL QUESTIONS SHOULD BE CLARIFIED.

The matters raised by Petitioners present substantial federal questions which are presently unsettled. Certiorari should be granted so that this court can give guidance to the states.

In Everson v. Board of Education, 330 U.S. 1 (1947), this court intimated that there was a neutral zone between the requirements of the Establishment Clause and the commands of the Free Exercise Clause. In this zone, it would be permissible for states to provide benefits to children attending church-related schools, but not mandatory. This Court has asserted that the state is not required to extend equal services to children attending public and nonpublic schools. But, once it has provided assistance to all children, it is not free to withdraw these benefits on the basis of religion. Nor is it free arbitrarily to cut off benefits on the basis of institutional association.

This court has given plenary consideration to numerous cases which define the limits of the Establishment Clause. However, no case has given full consideration and clarification as to the Free Exercise boundary of the neutral zone nor the Equal Protection requirements within the zone.

The Free Exercise issue was raised in Brusca v. Missouri, 332 F. Supp. 275 (EDMo. 1971), affirmed without opinion,405

U.S. 1050 (1972), and Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (WD Mo. 1973), affirmed without opinion, ____ U.S. ____, 43 LW 3230, (October 21, 1974). In neither of those cases were the issues concretely framed as they are here. In neither case was there an actual statute for review. Brusca presented an abstract claim that the plaintiffs were entitled to state aid for the purpose of enabling them to give their children an adequate religious education in sectarian schools. Brusca, supra, 278. The claim of the plaintiffs of the Establishment Clause. In Luetkemeyer, the plaintiff claimed that the State Legislature must enact a pupil transportation law which would include private as well as public school children.

The case here is different. The Missouri Legislature has enacted a textbook law and expressly declared that all children should benefit equitably and without discrimination in the program. Unlike Brusca and Luetkemeyer, here we are dealing with the withdrawal of legislatively granted services.

This court summarily disposed of Brusca and Luetkemeyer. Thus they are a very limited guidance to the states as they deal with the complex problems of preserving Free Exercise while avoiding Establishment. Edelman v. Jordan, ___, U.S. ___, 94 S. Ct. 1347, 1359-60 (1974).

This case is not controlled by Norwood v. Harrison, 413 U.S. 455 (1973). The state has a duty to be hostile to racial discrimination. However it's duty towards religion is to be neutral. "...the constitution...places no value

on (racial) discrimination as it does on the values inherent in the Free Exercise Clause." (parenthesis added.) Norwood, supra, pp. 469-470. We note that the writer of the Norwood opinion did not consider it dispositive of the issue presented in Luetkemeyer. A fortiorari, it is not dispositive of the issues here. Luetkemeyer, ___ U.S. ___, 43 LW 3230, (Dissenting Opinion).

This court should grant Certiorari to clarify the serious, unsettled questions that have arisen as to how far a state may go in prohibiting that which is permissible under the Establishment Clause before it infringes the Free Exercise Clause and as to whether a state may withdraw granted benefits, permissible under the Establishment Clause, on the basis of religion or association with church-related institutions.

B. DENIAL OF EQUAL PROTECTION:

The State may not "invidiously" discriminate in classifying persons for participation in a public program. There must be a reasonable basis if differing treatment is given those similarly situated. Where a fundamental right is burdened, a stricter standard applies. Such classifications are "closely scrutinized" and Equal Protection is violated unless there is a "compelling state interest" which justifies the classification and the state has no alternative means to attain its ends which do not burden rights. Shapiro v. Thompson, 394 U.S. 618 (1969); West Va. State Board of

Education v. Barnette, 319 U.S. 624 (1943).

Free Exercise of Religion is a fundamental right. "...only those interests of the highest order and those not otherwise served can overbalance the legitimate claims to the Free Exercise of Religion." Wisconsin v. Yoder, 406 U.S. 205, 215; also see: Sherbert v. Verner, 374 U.S. 398 (1963). The evidence here is that some Petitioners chose church-related schools "in the exercise of their religious convictions." (Transcript on Appeal, Vol. II, pp. 217 and 246.)

Freedom of Association is also a fundamental right. "It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-61 (1958), NAACP v. Button, 371 U.S. 415, 444 (1963).

The Missouri Legislature tried to treat all school children equally. The Textbook Act expressly declared that children should be treated "on an equitable basis and without discrimination on the grounds of race, creed, color, national origin, or school attended."

Section 170.051-3, RSMo. Supp. 1973. However, the state court pruned the universal program of the legislature by eliminating one class of children; namely, those who attend church-related schools. Children in public schools receive textbooks; children in non-sectarian private schools receive textbooks; children in church-related private schools are barred. The classification is based solely on the Petitioner's exercise of their religion and their association with church-related schools.

What compelling interest does Missouri assert in defense of its infringement of religion and freedom of association?

No claim is made that public funds must be conserved for public schools. Children of non-sectarian, nonpublic schools are eligible. And the evidence is that there are ample funds available to buy textbooks for all children. (Intervenor Defendants Exhibit No. 3.)

No claim is made that the program violates the Establishment Clause. It passes secular purpose, effect, and non-entanglement tests. Board of Education v. Allen, 392 U.S. 236 (1968), disposes of this issue and the state court does not dispute this.

In defense of its withdrawing of textbooks from children attending church-related schools, Missouri claims a policy of separation of church and state that is "more restrictive" than the Establishment Clause (Appendix B, p. A37). However, Missouri's "more restrictive" policy is

not the application of reason to the complex task of preserving individual rights as well as the separation of church and state but the arbitrary exercise of judicial fiat.

An evidentiary hearing was held in this case. The courts did not find that the state law provided textbooks of a religious nature. The books were genuinely secular. They were not diverted for religious use. The court did not find that the providing of textbooks supplanted resources of church-related schools (the uncontroverted evidence is that private schools in Missouri do not buy textbooks; they are purchased by the parents or the child). The court did not find that government action resulted in aid to religion; it applied the "child benefit" theory. The sole basis for the court's withdrawing of textbooks from children attending church-related schools is the conclusion of the court that the individual students, by their mere attendance of a church-related school, promoted a sectarian purpose.

Having undertaken a program of lending textbooks to all children, the state cannot exclude individuals "because of their faith or lack of it, from receiving the benefits of public welfare legislation." Everson v. Board of Education, 330 U.S. 1, 16 (1947).

The state court here arbitrarily created a minority class, i.e. those children who select church-related private schools, and without any reasonable relationship to the state's interest, withdrew public benfits from such children.

It is submitted that there is no legitimate state interest in penalizing an individual because of his association with religious institutions. On the contrary, such state action is an impermissible violation of Free Exercise of Religion and of Freedom of Association (Further see: Point C).

The state has alternative means of achieving its policy without infringing fundamental rights; namely, through "cautiously delineated" statutes. However, the Missouri court did not say that all children may borrow textbooks so long as religion is not aided. It did not allow the legislature any "play in the joints" to work out a sound and reasonable program. The court's application of the state constitution simply places an absolute barrier to participation by the minority of children. To place special obstacles in the path of minorities which deny them public benefits and rights is not permissible. Hunter v. Erikson, 393 U.S. 385 (1969); Nyquist v. Lee, 318 F. Supp. 710, affirmed without opinion, 402 U.S. 935 (1971).

By withdrawing textbooks, the Supreme Court of Missouri has denied Petitioners the right to Due Process and Equal Protection and have imposed a heavy burden on the Free Exercise of Religion and Freedom of Association which is neither warranted nor justified by the need to keep church and state separate.

C. THE STATE COURTS DECISION SETS A PRECEDENT WHICH THREATENS THE FREE EXERCISE OF RELIGION AND FREEDOM OF ASSOCIATION OF ALL PERSONS.

The state court said, "Obviously if the expenditures called for in Section 170.051 were considered as an aid of a church, this section (Article IX, Section 8 of the Missouri Constitution) as well as others herein quoted from the Missouri Constitution, would make this statute unconstitutional." The state court did not conclude that the textbook program was in aid of a church, but went on to state that, "for the purposes of this case, we have applied the 'pupil-parent benefit' theory...to the statute and Article IX, Section 8." The state court opinion goes on to pose this question, "Is the expenditure of funds to the pupil-parent in aid of a sectarian purpose?" (Appendix B, p. A44.) (More accurately here the question should be: Is the lending of secular textbooks to the pupil-parent in aid of a sectarian purpose? Neither the pupil nor the parent receive any funds. Funds are distributed exclusively to public agencies.) The state court concluded that an individual, by attending a church-related school, does, by that very fact, promote a sectarian objective. Based on this reasoning, the state court concluded that the lending of textbooks to pupils attending church-related schools is in violation of Article IX, Section 8 of the Missouri Constitution.

The state court held that an individual is constitutionally prohibited from receiving a public benefit if the individu-

al also pursues a sectarian purpose or associates with those who do. This is a radical and heretofore unenunciated principle. If this is the rule of law to be applied, virtually every governmental service and benefit could be withheld from those citizens who associate with a church-related institution.

We do not assert that the receipt of a benefit by a pupil or parent insulates a law from constitutional prohibitions, where the individual is merely a conduit for aiding religion. E.g. Committee v. Nyquist, 413 U.S. 756 (1973), Sloan v. Lemon, 413 U.S. 825 (1973). On the other hand, what the state court here has done is to rule that a child's attending a church-related school taints an otherwise legal relationship between the child and a public benefit.

Parenthetically, it should be noted that Missouri's "guilt by association" rule extends beyond religion. Numerous children who attend church-related schools are not of the same faith as the sponsor of the school. For example, the evidence in this case is that over 50% of the children attending Central Catholic School (where some of the Petitioners attend) are not Catholics. (Transcript on Appeal, Vol.II, p. 64.) Private school pupils, like private schools, "are not fungible." Norwood v. Harrison, 413 U.S. 455, 471 (1973). Although an Agnostic, Protestant, or Jew does not attend a Catholic school to promote religion, his mere association with a church-related school is the basis for Missouri's taking away his textbooks.

If a child's association with a church-related institution taints this public benefit, then why would it not taint all? Such an extreme rule of law is beyond the state's interest and places the state beyond neutrality and makes it the adversary of religion. By so doing, the Missouri has infringed the Free Exercise of Religion and Freedom of Association of petitioners.

CONCLUSION

Petitioners submit that for the reasons aforesaid, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Missouri.

Respectfully submitted,

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November 25, 1974